The Leveson Inquiry

culture, practices and ethics of the press

APPLICATION OF RULE 13 OF THE INQUIRY RULES 2006

Lord Justice Leveson:

1. When this Inquiry was set up pursuant to the provisions of the Inquiries Act 2005 ('the 2005 Act'), it was split into two parts. The first deals with the culture, practices and ethics of the press, relationships between national newspapers and politicians, relationships between the press and the police and the failure to act on previous warnings about misconduct. It requires recommendations, first, for a more effective policy and regulatory regime, supporting the integrity and freedom of the press, its plurality and independence and taking account of other matters; secondly, as to ways in which concerns as to practice and regulation might be addressed; thirdly, as to the future conduct of relations between politicians and the press and the police and the press. It is primarily qualitative in its form. Is there a problem with the way that the press, or a section or sections of the press, has operated sufficient to require a new approach to regulation or the relationships identified and, if so, what should that be?

2. The second part of the Inquiry is focussed on the extent of unlawful or improper conduct within, among other media organisations, News International. It looks into the extent of any alleged corruption or improper inducement and the extent of corporate governance or management failure. It is primarily quantitative in form albeit overlapping to some extent. Thus, the failure to act on previous warnings which is part of para. 1(d) of Part 1 covers similar ground to the inquiry into the investigation of unlawful conduct and the review by the Metropolitan Police of their initial investigation which is para. 4 of Part 2. The extent and effect of this overlap on this part of the Inquiry has been the subject of recent additional submissions by Mr Neil Garnham Q.C. and Ms Christina Michalos for the Metropolitan Police Service. Their concern is free-standing and I intend to address it in a separate ruling.

3. The reason for the Inquiry being split into two parts is well known. There is, at present, a substantial police investigation into the subject matter of the Inquiry which has led to many arrests and may, in due course, lead to prosecutions. Public concern about revelations in connection with the interception of mobile telephone voicemails and the approach to such issues by the *News of the World,* the police and the Press Complaints Commission (in addition to concerns about the relationship between the press and

politicians) required review and reconsideration much more urgently than would be possible if it were necessary to await the outcome of the existing police investigation and any prosecution. On the other hand, it is very important that any Inquiry does not prejudice either the police investigation or any potential prosecution to such extent as thwarts the investigation or renders a prosecution so unfair as to constitute an abuse of process. That does not mean that there can be no mention of any person under investigation (see, for example, *West* [1996] 2 Cr App R 374, *Montgomery v. H.M. Advocate* [2003] 1 AC 641 and *R v. Abu Hamza* [2007] 1 Cr App R 27) but it would be wrong to descend into such detail by way of statement as to anyone's guilt of a criminal offence such as could itself amount to a violation of Article 6(2) of the European Convention for Human Rights: see *Allenet de Ribemont v. France* 20 EHRR 557; *Daktaras v. Lithuania* (2002) 34 EHRR 60. A more detailed analysis of this issue can be found in my Ruling of 7 November 2011: see http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Approaches-to-evidence-7-November-PDF-106KB.pdf .

4. Thus, the tension which has run through Part 1 of the Inquiry as it has proceeded is between obtaining a sufficient narrative account of what has transpired to provide a basis in the evidence for conclusions which address the requirements of the terms of reference (which I have always insisted was essential) while, at the same time, not pursuing lines of inquiry or descending into such detail as potentially causes prejudice. This has meant, by way of example, that none of those who have been arrested by the police have been required to give evidence that touches the subject matter of their arrest. Although I recognise that there have been occasions when assertions have been made about individuals which are inconsistent with my general approach, in the main, the line has been maintained.

5. In addition, I have gone further. As a matter of fairness, as I have sought to protect the names of those who have been arrested from being linked with specific allegations of criminal conduct, so I have not thought it right to allow those who have not been arrested to be named as guilty of crime, even where I anticipate no prospect of a criminal investigation (if only because of lapse of time): thus, I have not permitted to be named reporters whom it is alleged used the services of the private detective, Steve Whittamore, whose records revealed what it is common ground is strong prima facie evidence of multiple requests (prior to his arrest in March 2003) by sections of the press for information the provision of which would constitute a breach of the Data Protection Act 1998. While re-iterating the need for a narrative, my mantra, for this part of the Inquiry, is that I am not concerned with 'who did what to whom' and I have referred to the extension of the protection which I have afforded to those who have been arrested as a self denying ordinance.

6. The Inquiry has essentially dealt with issues concerning the press and the public and the press and the police. It is now moving into the module that concerns the press and politicians. In the meantime, however, it has been

necessary to consider where the Inquiry is going and what additional protection must be afforded within the framework of the legislation to those persons or organisations who are or may be criticised in any Report. I say 'may be criticised' because it is important to emphasise that until the evidence and argument phase has been completed, I have formed and will form no concluded view. Further, as is clear from the legislation, I have a discretion about warning anyone who has been criticised expressly or inferentially in the evidence or who may be criticised in the Report but I cannot include any explicit or significant criticism of a person to whom I have not given such a warning.

7. This issue has been the subject of submissions in writing from core participants, oral submissions and, in some cases, further written submissions. I have considered all with care and this ruling now deals with the position in the context of this Inquiry and will not necessarily be applicable to any other. Before considering the specific arguments, however, it is appropriate first to set out the legal framework and the statutory position and then to turn to the specific considerations of fairness relevant to this Inquiry.

The Legal Framework

8. One of the touchstones of the inquisitorial process prescribed by the 2005 Act is the requirement of fairness to all. Whereas s. 17(1) of the Act provides that the procedure and conduct of the Inquiry shall be such as I direct, that provision is subject to s. 17(3) in these terms:

> "In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."

9. No higher manifestation of that duty is apparent than that which deals with the requirement that those who may be criticised in any report have the opportunity afforded to them to deal with the basis of that criticism. The origin is to be found in the Royal Commission on Tribunals of Inquiry (Cmnd 3121, 1966) ("the Salmon Report") which proposed, among other recommendations, that before a person was called as a witness, he should be informed of any allegations which are made against him and the substance of the evidence in support of them: thus were born Salmon letters although over-rigid adherence has been recognised as 'unhelpful': see the observations of Sir Richard Scott VC (in (1995) 111 LQR 596) to the effect that every inquiry must adapt its procedures to meet its own circumstances.

10. The next manifestation of this requirement (described as 'fair play in action' by Sachs LJ in *Re Pergamon Press Ltd* [1971] Ch 388 at 405) dealt with comment on proposed criticism. Mr Robert Maxwell's attempt to obtain sight of proposed draft conclusions was rejected in the Court of Appeal when

Lawton LJ put the matter in this way: see *Maxwell v Department of Trade and Industry* [1974] QB 523 at page 541B-D:

> "Those who conduct inquiries have to base their decisions, findings, conclusions or opinions ... on the evidence. In my judgment they are no more bound to tell a witness likely to be criticised in their report what they have in mind to say about him than has a judge sitting alone who has to decide which of two conflicting witnesses is telling the truth. The judge must ensure that the witness whose credibility is suspected has a fair opportunity of correcting or contradicting the substance of what other witnesses have said or are expected to say which is in conflict with his testimony. Inspectors should do the same but I can see no reason why they should do any more."

11. Notwithstanding these judicial observations, the broad process was adopted by Lord Bingham in the BCCI Inquiry, by Sir Richard Scott in the Inquiry into Matrix Churchill and also by Sir John Chilcott in the Iraq Inquiry. This lack of clarity is itself unhelpful and potentially productive either of very substantial delay or satellite litigation (in each case with attendant cost) or both.

12. The 2005 Act (pursuant to which this Inquiry is being conducted) adopts a different and, in my judgment, self-contained approach to ensure fairness. First, s. 21 of the Act provides that I may by notice require any person to provide evidence in the form of a written statement along with documents. Such notices have identified, in comprehensive terms, the issues with which the statement has been required to deal; where appropriate, it has identified relevant documents or other public statements which should be addressed. It cannot, of course, deal with evidence not then seen by the Inquiry but where issues of significance have arisen before the witness arrives, forewarning has been given and, if necessary, witnesses allowed time to deal with a matter for which they were not prepared. Where the issue has arisen only after the witness has given evidence, again if it is significant, second statements have been requested and obtained; more than one witness has been required to return to give further evidence.

13. The second (and most extensive) protection is provided by Rules 13-15 of the Inquiry Rules 2006 ('the 2006 Rules') which concern what are described as Warning Letters. Thus, Rule 13 provides:

> (1) The Chairman may send a warning letter to any person:
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> a. he considers maybe, or who has been, subject to criticism in the inquiry proceedings; or

b. about whom criticism may be inferred from evidence that has been given during the inquiry proceedings; or

c. who may be subject to criticism in the report, or any interim report.

(2) The recipient of a warning letter may disclose it to his recognised legal representative.

(3) The inquiry panel must not include any explicit or significant criticism of a person in the report, or in any interim report, unless

a. the chairman has sent that person a warning letter; and

b. the person has been given a reasonable opportunity to respond to the warning letter.

14. In the context of this Inquiry, particularly when analysed in the context of the requirement of fairness in s. 17(3) of the 2005 Act, what does this mean? In purely legal terms, the questions can be articulated as four issues. First, what constitutes a 'person' for the purposes of the rule: it obviously includes individuals but does it include a body of persons corporate or unincorporated or, further, an entity which has no legal persona such as a newspaper title that exists only as a division within a unified corporate structure? The second is related and could be articulated either as the question whether 'person' includes the press as a whole or, alternatively, by moving from the general to the particular asks the question whether a criticism which relates to the culture, practices and ethics of the press as a whole, rather than any particular newspaper group or individual title is caught by the rule. The third is an over-arching issue raised by a number of core participant newspaper groups and relates to the extent to which, given the Terms of Reference along with its limitations and what I have described as the self denying ordinance, it is fair for me to make general criticisms of the culture, practices or ethics of the press as a whole that I justify by reference to evidence using a narrative which provides specific examples from which individual reporters or titles can be identified by reference to the transcripts. The fourth issue (which may be a sub-set of the third) concerns the question whether I am entitled (subject to warning) to criticise a witness for the evidence given to the Inquiry and, more particularly, not to accept that evidence on the grounds that this might imply that the witness is guilty of perjury and thus offend the self denying ordinance.

Fairness in Context

15. Before dealing with these issues, I ought to deal with my approach to fairness both generally in relation to the procedure and opportunity for those affected to adduce evidence and make representations and specifically in relation to the protection of those being investigated and the consequences of the self denying ordinance.

16. In relation to procedural fairness, first, there has been the opportunity for those whom I adjudge, in relation to the Inquiry, have played or may have played a significant role, or have a significant interest in an important aspect or who may be subject to explicit or significant criticism during the Inquiry or in the Report to apply for core participant status (see Rule 5 of the 2006 Rules). As far as I am aware, all bar a very limited number of national titles have become core participants. With that status, they have been able to make representations as to the witnesses to be called (as opposed to being read into the record of the Inquiry), they have had advance notice of the evidence likely to be called and have been in a position to submit questions to Counsel to the Inquiry or ask for leave to pursue lines of enquiry themselves (Rule 10) and, at each stage, they have been able to make submissions on issues that have arisen. When individual core participants have felt that they have been dealt with unfairly by a witness, it has always been open to them to submit evidence and, when I have considered it necessary whether because the issue is important or in the interests of being fair, I have received evidence in response. Inquisitorial in nature, I have endeavoured to ensure that the Inquiry has not become unbalanced.

17. The second and third statutory mechanisms for avoiding unfairness are the procedures described above, that is to say in relation to witnesses, the notice required under s. 21 of the 2005 Act and in relation to those who may be affected by the Report, the warning procedure under Rules 13-15 of the 2006 Rules. On the face of it, provided I am careful not to cause such prejudice to the criminal investigation or any potential prosecution (for reasons related to the potential impact on those proceedings rather than the Inquiry), compliance with the legislation must (or at least should) be sufficient.

18. In any event, and regardless of whether the legislation provides a self-contained code to ensure fairness (see paragraph 11 above) there is another mechanism (entirely outside the terms of the statute and the rules) whereby unfairness can be avoided. The proceedings of this Inquiry have been available to all to see and experience on the internet. Not only are the witness statements and a full transcript published daily but, in addition, the evidence is streamed live and available for review at any time. Thus, anyone interested to follow what has been said is able to do so and, indeed, search the daily transcript either by name or subject matter. In that way, witnesses or other persons who feel that they have not been fairly treated are able to learn of the facts and, if they wish, communicate with the Inquiry. A number have done so and if, in the interests of fairness and in the light of the issues likely to be addressed by the Report, it has been thought appropriate, steps have been taken either to adduce further evidence or redress the balance in

some other way. I make it clear that, in order to maintain focus and direction, I have not taken this course (either with the core participants or those communicating directly with the Inquiry) if the challenge relates to an issue that is peripheral to the Terms of Reference or so fact-sensitive as to require over-extensive or lengthy analysis in relation to a subject matter that I will not be in a position to resolve within the broad time frame available to me.

19. Turning to the protection of those being investigated and the consequences of the self denying ordinance, it is important that the approach I have outlined in paragraphs 1-6 above should not be misunderstood because it is submitted by a number of core participants that this approach has limited what I able to do in the context of the Rule 13 procedure and the Report, and that effectively I am now prevented from taking a different line. It is necessary to go back to the beginning.

20. In this Part of the Inquiry, I am not addressing the detail for its own sake but, rather, the culture, practices and ethics of the press in general. The purpose (as defined by the Terms of Reference) is specifically to be able to make recommendations about an effective regulatory regime which itself requires me to look primarily at whether the present regulatory regime has either succeeded or failed: that is the reason why a narrative of facts is essential. Thus, if no criticism can be made of the culture, practices and ethics of the press or any section of the press, there is no need to re-visit the regulatory regime. On the other hand, it does not need an inappropriate culture or unethical practice to be evidenced universally to demonstrate that the present regime is not fit for purpose. In the same way that the system of death certification properly fell for review because of the activities of one doctor, the fact that criticism is limited to a section of the press does not matter: what matters is the question whether the culture or practice reveals an absence of necessary oversight, governance or appropriate regulatory control (whomsoever is responsible for that regulatory control, that is to say whether the system is self regulatory or otherwise). This can only be judged by looking, first, at the complaints about press culture and practice on the one hand and, secondly, at how they have been addressed. The identity of those who are responsible for any breach of standards is incidental to this exercise and does not take forward the necessary analysis; that there have been such breaches are, however, an essential part of the story and critical to my fulfilling the Terms of Reference of this part of the Inquiry.

21. Seeking to maintain the line between establishing culture, practices and ethics on the one hand and unnecessary focus on the facts with the risk of prejudicing the investigation or any prosecution provides the context in which my observations during the course of the Inquiry must be set. Reference has been made to the first ruling in relation to Core Participant Status: (http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Core-Participants-final-14.09.11.pdf) when I observed that Part 1 was "not concerned with the apportionment of personal or corporate responsibility".

22. Secondly, during the course of ruling on the approach to evidence (*supra*), I said (at para. 18):

> "On the other hand, as I have said, the nature of the investigation is directed to culture, practices and ethics and although questions could be directed to the activities and knowledge of named individuals (in respect of which I have no doubt that there is substantial public interest), I am satisfied that it will be possible to maintain the focus that I have identified; questions of individual responsibility clearly fall within Part 2 of the Inquiry which is to follow the conclusion of the criminal investigation and any prosecution."

In the same ruling, I also expressed the words of caution (at para. 34):

> "I must not leave the analysis of the [use by the media of illegal or unethical techniques] at such a high level that it is open to the criticism that it is insufficiently evidence based to justify reaching conclusions about the adequacy of present methods of regulation and the justifiability of new or different mechanisms. That is so particularly if it could be suggested that any new regulatory system, howsoever devised or organised, could impact adversely on freedom of expression or have a chilling effect on the responsible journalism which is so critical in our democratic society."

23. Finally, reference has been made to the ruling on Anonymity that was concerned with the redaction of the names of titles identified by journalists providing anonymous evidence through the General Secretary of the NUJ. The ruling makes it clear (at para. 8) (http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Anonymous-Witnesses-Ruling-PDF-64.5-KB.pdf):

> "The purpose is specifically to minimise the impact of reputational damage on identified titles bearing in mind that the maker of the statement cannot be challenged as to his or her credibility. I am conscious that the effect is that any one particular title will legitimately be able to argue that there is no basis for reaching any adverse conclusion about that title but I repeat that I am not concerned to make decisions about the culture practices and ethics of each or any title (although in relation to some issues which illustrate wider principles where the evidence has not been anonymous but has been sufficiently tested, I may well do so). I am concerned with the culture practices and ethics of the press as a whole specifically

> for the purposes of considering what, if any, modifications to the regulatory regime are appropriate. To some extent, because of the on-going police investigation, I am necessarily restricted in the extent of the possible investigation but, save for this (very significant) limitation, I have no doubt that the public interest requires me to go as far as I can to expose what has been happening in an attempt to provide a measure of reassurance that the regulatory regime going forward (whether its form is the same or different) is fit for the purpose for which it is required. That, after all, is the purpose of the Inquiry and the justification for the considerable investment of public time, money and effort into it."

24. By these observations, I was not suggesting that no adverse comment would ever be capable of being linked to any particular title or any particular journalist: indeed, the words in the first parenthesis in this observation indicate the precise converse. I was seeking to say that I would not be going through each complaint against each title or each journalist and making findings of fact simply for the purpose of allocating individual responsibility: I return to this issue in the context of submissions that have been made. To such extent as journalists were not being named for reasons of fairness, I would still make findings as to culture, practices and ethics for the purpose of informing my view about the regulatory regime and the extent to which it dealt with legitimate concerns about the way in which the press operates. In that regard, I repeat that I have consistently spoken of the need for a narrative which must be evidence based. In some cases, the fact of complaint without any possible form of redress is sufficient. In other cases, it might be sufficient to indicate that I am satisfied that a particular practice was either more widespread or more generally accepted than occurring solely at the *News of the World*. Having said that, I did not intend to rule out making findings about the culture, practices and ethics of the press which were evidenced by specific complaints either unchallenged or, if appropriate, sufficiently based in fact to justify the conclusion that they support the general culture or practice to which I am then referring.

25. The upshot of this analysis is that although I intend now to examine the submissions that I have received and I am happy to test the propositions of law put forward on their merits, I approach the questions on the basis that I am inclined to the view that there is more than enough protection built into the statute and otherwise to protect those who could be the subject of criticism. Furthermore, I am surprised by the submission (which is the effect of what Mr Desmond Browne Q.C. for Trinity Mirror plc appears to be arguing) that the necessary consequence of the Terms of Reference and the self denying ordinance is that, so far as individuals were concerned, I could not cross refer any narrative to the evidence (because that would impliedly criticise identifiable witnesses) and thus could not criticise either a

newspaper in general – because that impliedly involved those who were responsible for that newspaper – or any individual. Such a view, if correct, would mean that much of the time of this Inquiry has been taken up to no purpose whatsoever: no-one has previously made that suggestion and, given the enormous expense that has been incurred by many in connection with the Inquiry, I would have expected it to have been argued and any decision to the contrary to be challenged by way of judicial review. As I have indicated, it would also permit anyone dissatisfied with my conclusions to complain that no evidential basis for them had been established. I will return to the argument later in this ruling.

What constitutes a 'person'?

26. I have no doubt (and the contrary was not suggested) that the concept of a 'person' in Rule 13 of the 2006 Rules includes both an individual and a body corporate or unincorporate. Although there is no definition within the 2005 Act or the 2006 Rules, a proper reading of the Interpretation Act 1978 makes it clear that "[i]n any Act, unless the contrary appears" (section 5) "person includes a body of persons corporate or unincorporated" (Schedule 1). The Interpretation Act 1978 applies to subordinate legislation including the 2006 Rules by virtue of section 11. Further, bearing in mind that bodies corporate will and often have been the subject of criticism in public inquiries and that the reputations and commercial success of such bodies can be adversely effected by criticism, there is therefore good reason for them to fall within the scope of Rule 13.

27. Slightly less straightforward is whether the 'person' for the purposes of Rule 13 is or should be the legal entity that owns or operates the title, the title itself or both. The preponderance of the submissions that I received was to the effect that any notice should be addressed to the body that owns the relevant title on the basis that the title itself has no legal status other, presumably, than as a trading name. For understandable reasons, Mr Anthony White Q.C., for News International, submitted that a notice could and should be addressed to a title where a single company owns and operates a number of titles because the titles are run as separate entities editorially and each has its own culture. It is further submitted that senior individuals upon whom a potential corporate criticism could reflect should also be sent warning letters. However, any exercise of focussing on the potential responsibility of individual editors or other senior managers would be wholly impractical in the context of this Part of my Inquiry if I were begin to do justice to the fact-specific issues which would arise. Furthermore, in my judgment it is unnecessary for the purposes of the 'sufficient narrative' I am seeking to draw out. For these related reasons, I should make it clear that any corporate criticisms I might make in the wider context of the culture, practices and ethics of the press should not be interpreted without more as implying any individual criticisms.

28. In my judgment, the correct addressee of any Rule 13 letter is the body corporate or unincorporate and not the titles or individual trading names of that body which has no separate legal identity and it is not an unincorporated association. Further, where newspapers have sought to be represented before me, it has been common ground that it is the relevant corporate entity that is the core participant and that different representations from different titles within such entities could be addressed appropriately. This is no different. Neither do I see any difficulty arising in practice from this analysis because if I wish to make a specific criticism, the nature of the analysis (with reference to the evidence) will make clear which title or titles are concerned. That brings me on to the second issue.

Can 'a person' include the Press as a whole?

29. On the face of it, the collective noun 'the press' is not an individual or a body corporate or unincorporated and the answer, therefore, should appear to be equally straightforward. Most press core participants argue, however, that Rule 13(3) should be construed more widely adopting the argument advanced by Jason Beer Q.C. in his book *Public Inquiries*. The argument proceeds on the basis that the Inquiry "must not include any explicit or significant criticism of a person in the report" (my emphasis) without having despatched a warning letter and given a reasonable opportunity to respond, so it is appropriate to construe the provision broadly as including anyone who might be identified as being associated, either positively or by implication, with any criticism. In other words, significant implied criticism is sufficient. In the context of this case, therefore, it is submitted that there are only a small number of publishers of national newspapers so that a general criticism of the culture or practices of the press is, at the very least, an implied criticism of each and, furthermore, the more general the finding the greater the potential risk of damage to reputation. It is also argued (by Mr Jonathan Caplan Q.C. on behalf of Associated Newspapers Ltd) that, in the absence of warning, it is difficult for the press core participants to know with any precision what general criticisms might be within my contemplation.

30. Mr David Sherborne and Ms Sara Mansoori, for core participants who complain about press conduct, submit that a generic criticism of the press does not fall within Rule 13(3). The press is a huge industry and any criticism will be general and at high level; the concept of class libel (used to justify the press submissions) is not apt and no reasonable person would understand that such criticism meant that each and every journalist was found to have acted in this way. In that regard, the primary argument of Mr Desmond Browne Q.C. (for Trinity Mirror plc) is that the scope of Part 1 of the Inquiry is such that no findings of fact are appropriate but his original submissions (at para. 32) were to the effect that if the contrary view prevails, a Rule 13 notice should be sent to all titles or groups 'capable of being understood as being referred to'; more recent written argument is that Rule 13 was never intended to cover generic criticism and cannot mean a class of persons.

31. To whom should any criticism be addressed? Although there have been examples of bad practice about which complaint is made, no-one has challenged the overall culture, practices or ethics of the regional press; criticism has been directed to national titles. This is relevant to a balanced consideration of any recommendations in relation to the regulatory regime. Thus, I recognise that criticism is most likely to be addressed to a section of the press consisting of the national titles even if a number of those have not been the subject of complaint or criticism. Even taking these features into account, my initial reaction to these submissions was that Rule 13 letters addressed to individual titles were unnecessary in the context of any general criticisms of the press. In addition to the points which Mr Sherborne and Ms Mansoori have made, my findings are likely to be couched in terms which make it clear that I am not condemning every group, let alone every title. As for the possibility that I might consider a criticism that has not been addressed, the early submissions which I have received in relation to Module 1 (the press and the public) have, in the main, been complete and exhaustive. Nobody who has listened to or read the evidence could be taken in the slightest by surprise by the general criticisms likely to ensue: it would, of course, be very different, in relation to any specific criticism of an individual which arises in this or any other module.

32. Having said that, for the purposes of this Inquiry (and without in any sense seeking to create a precedent for any inquiry that might follow), I have come to the conclusion that I ought to take a different approach to that which I formed initially. First, the overwhelming view of the press core participants is that advance warning in the form of a notice under Rule 13 should be provided (and should undeniably be provided if I were to cross reference criticism to evidence) and I cannot suggest that the contrary view to that which I have expressed is unarguable. To devote time, attention and expense further to review of this question of law will do no more than hold up the progress of the Inquiry. Secondly, in any event, it is an essential task for the Inquiry to collect together the potential criticisms of the press and, to do so, it is necessary at the very least to consider the evidence that supports such criticisms. To provide advance notice to 'the press' will not cause additional work and I will then have the benefit of the submissions that the press make provided, of course, that (unlike some of the submissions that I have received to date) these submissions are addressed to whether the potential criticism can be made of the press in general rather than whether any particular criticism can legitimately be addressed at an individual title or group.

33. In that regard, I broadly endorse the following recent submission of Mr Rhodri Davies Q.C., Mr Anthony White Q.C., Ms Lorna Skinner and Ms Anna Boase in these terms:

> "It is appropriate for the Inquiry's findings in relation to conduct of the press to be at a high level of generality. It does not matter whether, for example, phone-hacking occurred only at one title or was more

> widespread since it is an established problem of conduct by at least part of the press which will inform the recommendations made. Similarly, the problem of intrusion upon grief identified by certain witnesses is a problem of conduct by at least part of the press and it matters not for the purpose of making recommendations whether it occurred only at one title, at several titles, or at all titles. From this perspective the Inquiry can find that there are "concerns" about alleged press misconduct without determining whether the particular type of misconduct occurred on one occasion or one hundred, at one title or many."

34. Whether it will be sufficient to make a finding limited to "concerns" is a topic to which I return below and which may need to be the subject of a separate ruling under the general heading of the standard of proof but that my findings are directed to provide a narrative on which to base recommendations (in this context) as to an appropriate regulatory regime is, in my judgment, entirely correct. Suffice to say that if I contemplate a specific criticism of any sort against an individual journalist or title, a separate notice will be provided: work done whether by core participants or other press interests in relation to any Rule 13 notice addressed to 'the press' which seeks only to demonstrate that any specific criticism cannot be addressed to them will be time and effort wasted.

35. That conclusion deals with a submission made by Mr Gavin Millar Q.C. and Mr Adam Speker for Telegraph Media Group Ltd ('TMG') namely that if findings of fault apply only to part of the press, not including TMG, no letter would be required but that I should make clear that fact in the report. That exercise would, however, require a detailed consideration of all the evidence involving every title and every group, and simply could not be sensibly achieved in the context of Part 1 of this Inquiry and the practical and temporal constraints which have been imposed on me by the Terms of Reference. At the risk of yet further repetition, I am considering the culture, practices and ethics of the press as a whole. That said, most of the evidence related to identified titles and I recognise that if any criticism is justified by reference to the evidence (which is an issue I address below), it will be possible to link that criticism to a title although it is not my intention (save, perhaps, in relation to the *News of the World*) to make findings as to overall culture, practices and ethics of individual titles. That is not to say that, where appropriate, I may not make very specific criticisms: these will also be the subject of Rule 13 letters in the normal way but they will not be general or all embracing. Whatever might be the good practice of any individual title or group, the ultimate purpose of the whole exercise is to consider the efficacy of the regulatory regime; and it is in that context that the making of any of these criticisms is relevant. My recommendations will of course be focussed on industry-wide regulation, not on individual titles .

36. That leaves open the detail that such a notice must provide but it is worth adding one further observation in relation to what is meant by 'the press' which further elaborates the answer to Mr Millar's submissions. To date, it has been envisaged that notices would go to those media entities who have participated in the Inquiry as core participants. In fact, the term goes wider for by no means all national media groups have sought to be involved. By way of example, one such group is Independent Print Ltd (who, I understand, own and operate The Independent including 'i', The Independent on Sunday and the Evening Standard) and owners of national titles such as The Financial Times. I refer to them not because I am focussing on activities of these newspapers or because I have in mind evidence that causes me to question their practices but because they are undeniably part of the generic group which is encompassed by the national press. I shall require submissions as to which other groups or companies should be included.

37. For the sake of completeness, I ought to deal with a submission very recently made in writing by Mr Andrew Caldecott Q.C., Mr Patrick Gibbs Q.C. and Mr David Glen on behalf of the Guardian News and Media Ltd. It is suggested that the purpose of notification is not, so much, Rule 13 but because all print media core participants have a direct and highly important interest in how they are regulated and therefore in the nature and extent of any findings against the press generally (whether or not their particular title is implicated). It is submitted that the common law duty of fairness may require notice to a party of adverse findings on the grounds of affected interest even though the party in question is not itself the subject of the finding. In that regard, there is cited the observations of Lord Diplock in *Mahon v. Air New Zealand* [1984] AC 808 at 820G-821C. That case concerned a Royal Commission into an air disaster and identified as rules of natural justice, first, to base a decision on evidence of probative value and second, to listen fairly to evidence conflicting with the finding and rational argument presented by those whose interests ("including in that term career or reputation") may be adversely affected and ensure that they are not left in the dark as to the risk of the finding and deprived of the opportunity to adduce additional material which might affect the proposed adverse finding. It is for that reason, it is submitted, that fairness requires that the print media should be notified of any general criticisms; indeed, it is further argued that consideration could be given to notifying the regional press whose interest in the structure of any new regulatory regime is in principle the same, in addition (as I have envisaged) to national print media not core participants.

38. I do not consider that there is any difference between the approach suggested by the Privy Council in *Mahon* and the duty of fairness identified by the 2005 Act and, in particular, Rule 13-15 of the 2006 Rules although the context of the subject matter of the inquiry was different. The circumstances of *Mahon* were that the judge conducting the inquiry had differed from the Chief Inspector of Air Accidents as to the cause of the accident but had not given sufficient opportunity to the airline which he blamed from dealing with the criticisms or, indeed, identified material or probative evidence to

demonstrate that which he found. The potential adverse findings of culture and practices of the press are inevitably general to the press and not specific and I reject the notion (also suggested by Mr Browne Q.C.) that there has not been an opportunity to adduce evidence contrary to that which is critical of the practices of the press. I do not intend to produce any unexplored theory as to the happening of an event; I will simply be reporting on the culture and practice as I find have been sufficiently established by the evidence to justify making recommendations as to the adequacy of the regulatory regime.

39. In the circumstances, I do not accept that Rule 13 is inapposite because it will be the culture practices and ethics of the press that I will (or may) be criticising and, as I have indicated, any significant criticism that is or may be implied requires a notice. Further, neither do I accept that I am bound to send a Rule 13 or equivalent notice to anyone whom I do not intend to subject to explicit or significant criticism. Whereas in the air disaster case, it was clear that the airline was directly (rather than indirectly) affected by the decision of the judge, the impact in this case is different. During the course of *The Shipman Inquiry*, Smith LJ made recommendations which would affect the work and practice of doctors generally: there was no question of her seeking representations from every doctor who might be affected by the change. Those who wished to participate in the Inquiry doubtless did so. Similarly, in this Inquiry. I have, in fact, heard from many regional titles and have fully in mind the concerns that they have expressed: I am not prepared to extend whether by analogy or otherwise the Rule 13 procedure beyond the terms of the legislation.

40. That is not to say that I am unmindful of the separate interests of bodies such as the regional press and, as I have done with each of the modules of the Inquiry, I shall publish questions on the website for module 4 which is concerned with future regulation. To date, there have been many public responses to the questions that have been published for each of the modules and I will welcome similar responses (but especially from regional press interests or others who may be affected by a change in the regulatory regime) in relation to this part of the Inquiry.

Should criticisms be evidence based?

41. So cast, as a matter of common sense and public law, this question demands only the answer 'of course'. Decisions that each one of us make in our daily lives are based on our assessment of the facts and every judicial decision must be grounded in evidence, that is to say material that has been formally adduced whether in court or before the Inquiry and, in relation to the latter, whether called orally, put into evidence or otherwise made part of the record of the Inquiry. It is an important part of the open and transparent approach to justice (and, in the case of the Inquiry, to any assessment of the validity of the conclusions reached and recommendations expressed) that the justification for such conclusions and recommendations is visible and capable of being understood both by those affected and by the public. Although the

issue arises in a slightly different context, this fundamental principle must form the basis of any analysis of it.

42. The argument to the contrary is most vigorously advanced by Mr Browne Q.C. Having made the point that Rule 13 was not intended to cover generic criticism of a class of persons (doubtless because of the consequent need to provide reference to the evidence), he submits that providing the evidential basis for proposed generic criticism would serve 'to emphasise and compound the problem' because the publicly available transcripts of the Inquiry would identify the newspaper or journalists concerned which would offend what he describes as my mantra. He summarises the position by saying that the quandary faced by the Inquiry is a consequence of the Terms of Reference and that I should not run the risk of breaching the self denying ordinance. He goes on:

> "If that means that the Inquiry's generic criticisms of the culture, ethics and practices of the press lack the force that they might have had, if accompanied by detailed findings as to the specific conduct of individuals, that is the inevitable consequence of the limits placed on Part 1 [of the Inquiry]."

43. When I suggested in argument to Mr Browne that a consequence of that submission (made orally and repeated in writing) was that I should not be criticising anybody for anything, he responded to the effect that this was (as a starting point) "the necessary consequence of the terms of reference and the self-denying ordinance". I emphatically reject that submission. It seeks to elevate my wishes (a) to ensure that the criminal investigation and any prosecution were not unduly prejudiced; (b) as a matter of fairness, to treat those against whom criminal (or, possibly, other very serious) allegations were made but who were not under investigation no differently; and (c) not to focus on the detail of 'who did what to whom' into a rule that effectively prevents me from fulfilling the terms of reference to inquire into (and thus reach conclusions about) the culture, practices and ethics of the press. It ignores my requirement for a narrative and is neither justified nor justifiable. I simply do not accept that fairness to individual titles or individual journalists means that I should not reach adverse conclusions as to culture, practices and ethics and explain the factual basis which evidences those conclusions. This is no more than anybody could do were they to read the transcripts of evidence and I agree with the argument advanced by Mr Caplan Q.C. (following para. 34 of my Ruling of 7 November 2011) that it should not be left to the industry, campaigners, politicians and the public to undertake the exercise of piecing together what they perceive to be the evidential basis which, in any event, carries with it the inherent risk of inaccuracy.

44. Although I shall consider the arguments based in fairness, it is again important to set the scene by reference to the legislative context. Having decided that it is appropriate (and fair) to provide warning to the press of

criticisms which I might make relating to culture, practices and ethics, Rule 15 of the 2006 Rules then bites with mandatory force in these terms:

> (1) Subject to paragraphs (3) and (4), the warning letter must—
>
> > (a) state what the criticism or proposed criticism is;
> >
> > (b) contain a statement of the facts that the chairman considers substantiate the criticism or proposed criticism; and
> >
> > (c) refer to any evidence which supports those facts.
>
> (2) The chairman may provide copies of the evidence referred to with the warning letter, if he considers it appropriate to do so.
>
> (3) Where the warning letter is sent to a person under rule 13(1)(b)—
>
> > (a) the requirements of paragraph (1) do not apply, but
> >
> > (b) subject to paragraph (4), the letter must refer to the evidence from which criticism could be inferred.
>
> (4) Paragraphs (1) to (3) are subject to any restrictions on the disclosure of evidence, documents or information pursuant to sections 19 and 23 of the Act, or resulting from a determination of public interest immunity.

45. Thus, the scheme is straightforward. By Rule 13(1), I have a discretion to send a warning letter to any person whom I consider may be or who has been subject to criticism in the proceedings or about whom criticism may be inferred or who may be subject to criticism in the report but, by Rule 13(3), I cannot include any explicit or significant criticism of a person unless I have sent such a letter and provided a reasonable opportunity for response. Further, if a warning is based on Rule 13(1)(a) or (c), that is to say because of the fact or prospect of criticism in the proceedings or in the report, I must state the proposed criticism and the facts and refer to any evidence. If the criticism is only to be inferred from the evidence, so that the warning is under Rule 13(1)(b), the only obligation is to refer to the evidence from which the criticism could be inferred: Rule 15(3)(b). What the system mandates is that if (as most of the press core participants argued) it is appropriate and

fair to warn 'the press' of potential criticism of its culture, practices and ethics – not least because of the small number of groups and titles and the inference that the criticism could refer to any particular title – the evidential basis for the criticism must be provided. There is simply no basis in law for not doing so. Furthermore, it is important to recognise that, although the contents of a warning letter are subject to an obligation of confidence during the course of the Inquiry, that duty ends when the report is published: see Rule 14(1), (4) of the 2006 Rules. In this regard, I do not decide whether a report published at the conclusion of Part 1 of the Inquiry is an interim report or a final report or the impact of it being the former on the duty of confidence.

46. Turning from the general to the specific, it is first necessary to consider the Terms of Reference which clearly visualise 'the press' as capable of being a sufficiently homogeneous group to allow analysis of its culture, practices and ethics even if (as is undoubtedly the case) different titles and different types of newspaper will or may exhibit different or slightly different approaches to them. Nobody, however, has suggested that the legal or ethical approach should be different even if the pressures, the likely impact of ethical considerations on the type of story sought and the willingness to take risks might be. Having said that, it is clear that an isolated act of criminal or unethical behaviour would not, of itself, represent the culture or constitute a practice of 'the press'. Subject to a practice being sufficiently widespread to constitute evidence of a culture or practice of the press, however, there is no question of it being necessary to quantify that practice and, in any event, I will need to consider the extent to which the picture is built up inferentially and cumulatively.

47. A practice, such as the interception of mobile telephone messages or 'hacking' into e- mails, might be illegal; it might give rise to a civil wrong (such as breach of privacy) or be unethical (such as obtaining evidence by the use of subterfuge without any public interest). It also might be none of those but still part of the culture: examples could include dealing with complaints over-aggressively or prolonging resolution of the complaint in the hope that the complainant loses interest. It is inevitable that many such concerns are evidenced by specific examples which usually involve identified titles if not identified journalists. To be satisfied that a particular practice is part of the culture of the press does not necessarily involve making a specific finding of fact in relation to any one specific complaint although allegations which I consider do not provide prima facie support for a particular complaint will obviously be irrelevant: unless there is something worthy of investigation, no conclusions as to culture, practices and ethics can be drawn. On the other hand, the fact that there is prima facie support for a complaint may itself be relevant to the question of regulatory reform if the complainant either had no adequate mechanism for obtaining redress or the mechanism available obviously failed. General criticisms supported by evidence that exemplifies or manifests culture or practice within the press must be permissible so that the Terms of Reference can be addressed; individual criticism which does not

reach this level is not. To the extent to which the former identifies individual titles, this is inevitable and does not violate the self denying ordinance, provided that I continue to bear in mind the potential reach of the criminal law in terms of current and any reasonably foreseeable police investigation: I return to these issues below.

48. The Terms of Reference, the self denying ordinance and the need to act fairly do not give rise to any expectation that a newspaper will not face potential criticism. The limits that I place on criticising individuals revolve around the fact that those caught up in Operation Weeting or Operation Elveden have not been asked about those issues and cannot be criticised in relation to that which is there under investigation so that, in connection with that type of activity, it does not seem fair specifically to criticise others for less reprehensible conduct although that will not prevent me from identifying the evidence upon which I reach conclusions as to culture, practices or ethics and I recognise that this will not prevent anyone from searching the transcripts to identify names or titles used to exemplify the concerns that I express. That is not to say that I cannot criticise witnesses in relation to the evidence they have given to the Inquiry: that is the fourth question?.

49. I ought also to deal with the submission that the Terms of Reference, the self denying ordinance and the need to act fairly have, in some way, constrained what the core participants can or have done in connection with the Inquiry. I readily recognise that I have sought to maintain momentum and have not permitted as much time for some issues as perhaps some would have wished but I do not accept that the way in which the Inquiry has been conducted has prevented any core participant from challenging evidence either by submitting questions through Counsel to the Inquiry (and many have done so), by seeking to ask questions or by proffering witnesses to deal with allegations that have been made (both of which have occurred). The inquisitorial system described in Rule 10 of the 2006 Rules applies to every type of inquiry including those where the focus has most certainly been on who did what to whom.

50. A good example of the way in which I have put these principles into practice comes from the approach to Operation Motorman. Analysis of *What Price Privacy* and *What Price Privacy Now* by the Information Commissioner (subject to correction identified in evidence) along with the concessions as to what legitimate inferences could be drawn from the material as to prime facie breach of the law by more than one newspaper title, whatever might be said of the services that Mr Whittamore might lawfully have provided, provides evidence of the culture and practices of the press without the need either to identify the details of those about whom information was sought or the journalists who sought it; it was sufficient to identify the titles concerned, which in any event are in the public domain, and the fact that it was widespread. That is why I rejected applications to make public from the material that was seized during Operation Motorman the names of journalists who used his services: it would have been unfair to have done so

and is simply not necessary for the purposes of this Inquiry and its Terms of Reference. Thus, given the considerations that I have addressed above, it would have been wrong to do so.

51. In their recent submissions, Mr Jonathan Caplan Q.C. and Ms Sarah Palin for Associated Newspapers Ltd argue that any finding of knowledge 'within' or 'among' a section of the press should require identification of the title or titles which are the subject of the finding with Rule 13 letters addressed only to the publishers of those titles; particular concern has been expressed about the potential for criticism of 'the tabloid press' which Mr Sherborne specifically identified as including the Associated titles. On analysis, these submissions do not raise any fresh or different points. I have previously explained how I will be deploying the Rule 13 procedure in relation to any general criticisms, which may include criticisms as to knowledge 'within' or 'among' a section of the press, as well as the evidence underpinning such criticisms.

52. I now turn to mention one other topic raised in argument and to which I refer above namely whether it is sufficient (as Mr Rhodri Davies Q.C. submitted) that the Inquiry identify concerns about alleged press misconduct. This touches on what might be described as the standard of proof issue (upon which I have invited separate submissions) but can be articulated in the question whether I must be sure that the press is guilty of a particular type of egregious conduct, or satisfied on the balance of probability or whether it is sufficient that I consider the evidence reveals such a concern about the conduct that regulatory arrangements should be put in place to deal with that type of behaviour should it arise. Mr Andrew Caldecott Q.C., Mr Patrick Gibbs Q.C. and Mr David Glenn for Guardian Media Group Ltd. accept that on what are described as 'larger picture' issues, it may be open to find a relevant concern to be established although, if so, it is submitted that it should be attached to individual titles: for reasons which I have explained, I do not intend to take that course. Subject to the further argument that I have identified, I see force in limiting certain findings to an expression of concern sufficient to generate the need to ensure that a regulator regime can address that behaviour. Further, I presently see no reason why anyone responding to a Rule 13 notice addressed to the press should not be able to do so to differing standards so as, for example, to deal with the possibility that I might be prepared to find that a particular practice is a concern even if I am not satisfied on the balance of probability that it has happened.

Criticism of Individuals

53. Subject to my over-arching concern not to prejudice criminal investigation or proceedings, it has not been suggested that I should not use the procedure set out in Rule 13 in relation to certain witnesses. Thus, if I am minded to criticise a witness in relation to any aspect of the subject matter of the Inquiry, whether it be in relation to admitted conduct or because I do not accept his or her evidence to me or a combination of both then it must be

open to me to do so. The self denying ordinance and the need to be fair means that I will not name those journalists whose conduct in connection with the research into or publication of stories is not subject to criminal investigation but which may realistically become so. When seeking submissions on this topic, I put the matter this way:

> "I am presently minded to the view that this [self denying ordinance] does not prevent me from criticizing any individual who I do not suggest or imply participated in illegal conduct, but who I find knew perfectly well what was going on albeit that he or she now denies all knowledge of any such thing. To take an example away from the Inquiry, for X to know perfectly well that Y has stolen property whether he saw him do it or because Y admitted it to him does not make X guilty of any crime but it seems to me that if I conclude, assuming it to be relevant, that X falsely denied that he had that knowledge, that is a potential criticism for which warning must be given and, furthermore, that so to conclude does not imperil a criminal investigation or prosecution or represent unfairness to anyone as I try to discern the [culture], practices and ethics of the press."

54. In its original submissions, Trinity Mirror plc argued that a finding by the Inquiry along the lines that I have postulated would fall outside the scope of Part 1 of the Inquiry and, in any event, could "all too foreseeably lead to such individuals becoming the subject of criminal arrest and proceedings" essentially because a person found to have lied to the Inquiry could be charged with perjury. Suffice to say that I reject both arguments. As to the first, a finding that there was either knowledge and acquiescence on a widespread basis within the press that, say, mobile telephone messages were being accessed does not, in my judgment, go beyond a finding as to the culture, practices and ethics of the press as a whole: until *The Guardian* articles in July 2009, no-one had effectively challenged the single rogue reporter theory.

55. As to the second, in my judgment, it verges on the absurd to suggest that I cannot reject the evidence of one or more witness on the grounds that I do not accept that they have told the truth because that might offend the principle that I do not want to interfere with the ongoing criminal investigation: the criminal conduct to which I was referring was concerned with the investigations being undertaken in Operations Weeting, Elveden and Tuleta. I have never said anything that could be construed as protecting a witness who knowingly does not tell me the truth and, further, a finding that I do not accept what they do say encompasses not only the deliberate lie but also (in certain circumstances) a failure of accurate memory. Subject to the point that I must focus on facts that in my view inform both my sufficient

narrative and my recommendations for the future, I have no doubt that the public expect me to identify the facts as I find them to be and it cannot be expected that I am to do no more than summarise the effect of contradictory evidence without concluding where I conclude that the truth lies. Obviously, any witness whose evidence I am considering rejecting will have to be warned so that the opportunity of making representations is open to them: in some cases, that might be based on the resolution of a direct conflict of testimony but in others it might be that the inference which I draw from all the surrounding circumstances leads me to an adverse conclusion. To treat journalists differently to other witnesses would, in my judgment, be quite wrong.

56. All the other core participants who have responded to my request for submissions in this area accept that my initial view is accurate and justified: indeed, Mr David Sherborne put the matter in this way:

> "This is the only way that the inevitable questions which have been raised in the public's mind about the culture practices and ethics of the press and which, by definition, will not be dealt with in any criminal investigation, can properly be answered. It is a matter not just of satisfying the public interest but also of ensuring that the Inquiry fulfils its terms of reference as comprehensively as possible."

57. Without submitting that the course suggested is not open to me, Mr Anthony White Q.C. and his team expressed some concerns. First, it is suggested that there can be little scope for finding who knew what as there has been no focussed investigation of this issue; there are 'severe limitations' on the extent to which detailed findings of fact can be made save where the facts are admitted or beyond real dispute. Secondly, in some cases, given the offences of aiding, abetting, counselling and procuring (under s. 8 of the Aiders and Abettors Act 1861 as amended), encouraging and assisting (under s. 44-46 of the Serious Crime Act 2007 or conspiracy (under s. 1 of the Criminal Law Act 1977), the potential ambit of criminal liability is not clear cut, especially in the case of senior managers. Third, the mantra excluding 'who did what to whom' means that it would be unfair to modify that position and, if I were to depart from it, I should provide an opportunity to respond which may have to encompass allowing cross examination of allegedly supporting evidence.

58. I understand these concerns and will bear them in mind but, in general, I consider them to be misplaced. As I have already explained, I have no intention of making detailed findings of fact of the 'who did what' variety on any isolated basis, although some examples fully rehearsed in the evidence may exemplify rather wider conclusions about what I perceive to be the generally understood practices in, at least, some areas of the press. As a number of journalists have been prepared to speak specifically about

interception of mobile telephone messages, it should not be a surprise if I reach conclusions about that. If I were not minded to accept the proffered explanation, I anticipate that a Rule 13 letter would be necessary although, as I have said I recognise (as Mr Rhodri Davies Q.C. also argues) that the mere fact that an individual witness may not be telling the truth will not necessarily assist in establishing sufficiency of concern about press conduct to require recommendations for a new policy and regulatory regime and I will bear that feature in mind. I also accept the room for potential unfairness for the reasons that he outlines. What I am not prepared to do, however, is limit or restrict what I believe to be the appropriate and necessary analysis of the facts. In that regard, I am not modifying my approach to the difference between Parts 1 and 2 of this Inquiry and I doubt that any possible criticism, express or implied, should lead to a request to cross examine witnesses.

59. The concern in relation to breaches of the criminal law is echoed by Mr Neil Garnham Q.C. and Ms Christina Michalos who in their initial submissions add that findings in this regard might be prejudicial not only in relation to those who are or might be investigated but also to those who may be called as a witness either for the prosecution or the defence with the risk that an adverse finding on credibility could lead to an argument that a fair trial would not be possible.

60. I am very conscious of the ways in which the criminal law intersects with the activities with which this Inquiry has been concerned. I have been clear throughout that I do not intend to prejudice ongoing criminal investigations, extended to include those who could become the subject of such investigation. I have recognised these concerns in my Ruling of 7 November 2011 (which was not challenged) and I refer to the general position in para. 3 above. I understand the need for caution but I reject the submission that all critical comment as to credibility creates the risk suggested. I do not intend to cross the *Allenet de Ribemont* line but neither do I accept that this means that I must limit what I do on the basis that what I say could be construed and analysed as creating the possibility that an inchoate criminal offence or perjury could be inferred in circumstances where the risk of a criminal investigation (let alone a prosecution) is, at its highest, theoretical or speculative. As for witnesses, much more relevant than anything I say will be the underlying evidence which has been presented to the Inquiry; that will be available for any criminal trial and to such extent that witnesses have committed themselves, there will be ample opportunity for all sides in a prosecution to deal with the matter appropriately. Having said that, from what I have been told in the Inquiry about the police investigation, I do not anticipate that anything I say is likely to cause prejudice to the far broader contentions that prosecution and defence are likely to deploy.

61. It should be clear from the foregoing analysis that I do not accept that any statement I have made since the setting up of this Inquiry was announced precludes me, on fairness grounds, from criticising either titles or individuals to the extent I have indicated. In any event, in my judgment the Rule 13

procedure, which enables the object of any potential criticism to adduce further evidence or submissions, is a sufficiently robust safeguard to nullify any possible unfairness which might have arisen.

62. Although I will return to this topic when dealing with the standard of proof, it may be of assistance if I indicate that whatever view I take about findings in relation to the press (and, in particular, whether it will be sufficient to express concern about a particular practice), I would not expect to make any finding against individual at a lesser standard than the balance of probabilities.

Conclusion

63. The upshot of this Ruling is as follows:

i) Although 'the press' is not a person or a body corporate or incorporate, I shall address notices under Rule 13 of the 2006 Rules to 'the press' as a class likely to be restricted to the national (as opposed to the regional) press but to encompass not only core participants but also other companies who operate titles that fall within this definition.

ii) The notices shall be sent to bodies corporate or unincorporated that operate titles rather than to individual titles; they shall be general and not title specific and will not be addressed to individual editors.

iii) As required by Rule 14, any notice under Rule 13 will identify the evidential basis for the criticism that I am contemplating. This will consist of footnote references to the evidence which it may be possible to include by hyperlink.

iv) While recognising the concerns that have been expressed and accepting the possible limitations that may impact on my Report, I will issue individual notices under Rule 13 to witnesses or, if appropriate, individual titles.

64. For the avoidance of all doubt, this Ruling represents my decision as to the appropriate approach to the preparation of my Report. By s. 38(1)(b) of the 2005 Act, an application for judicial review must be brought within 14 days unless that time limit is extended by the court.

65. Before leaving the Ruling, I add one further comment which I emphasise has played no part in my thinking or my analysis of the appropriate approach but which is, to my mind, a point worth making although I do so with some diffidence. The public concern which led to the setting up of this Inquiry is beyond argument or debate. I do not know whether there will be prosecutions but, having regard to the number of arrests and the quantity of material seized (including the 300 m. e-mails which it is said have had to be analysed), if there are, it is likely that the process of pre-trial disclosure and trial will be lengthy so that Part 2 of this Inquiry will be delayed for very many

months if not longer. In those circumstances, it seems to me that it is in everyone's interests that Part 1 goes as far as it possibly can. If the transparent way in which the Inquiry has been conducted, the Report and the response by government and the press (along with a new acceptable regulatory regime) addresses the public concern, at the conclusion of any trial or trials, consideration can be given by everyone to the value to be gained from a further inquiry into Part 2. That inquiry will involve yet more enormous cost (both to the public purse and the participants); it will trawl over material then more years out of date and is likely to take longer than the present Inquiry which has not over focussed on individual conduct. Obviously, the more restrictive in its analysis that Part 1 has been, the greater will be the legitimate public demand for Part 2. I repeat that this possibility has not affected my approach to what I perceive to be appropriate in law and, when necessary, in the exercise of my discretion but it is undeniably a sensible strategic consideration for those who have participated in this Inquiry.

1 May 2012